United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2547

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FOR THE SECOND CIRCUIT

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74 - 2547

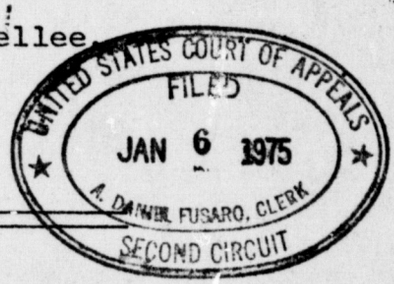
COLLEGE POINT DRYDOCK AND SUPPLY CO., RED STAR BARGE LINES, INC. and RED STAR TOWING AND TRANSPORTATION COMPANY,

Plaintiffs-Appellants,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendant-Appellee.



BRIEF FOR APPELLANTS

McHUGH, HECKMAN, SMITH & LEONARD
Attorneys for Appellants
80 Pine Street
New York, New York 10005

CHRISTOPHER E. HECKMAN

MARTIN J. McHUGH

Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLLEGE POINT DRYDOCK AND SUPPLY CO., RED STAR BARGE LINES, INC. and RED STAR TOWING AND TRANSPORTATION COMPANY,

Docket No. 74 - 2547

Plaintiffs-Appellants,

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendant-Appellee.

BRIEF FOR APPELLANTS

This is an appeal by the plaintiffs from a decision and judgment of the United States District Court, Southern District of New York entered October 23, 1974 after trial without jury dismissing the complaint in a suit on a policy of marine insurance covering, among other vessels, the non-self-propelled steel coal barge UBC NO. 5. The complaint contained two separate causes of action, the first for the agreed value of the vessel which was a total loss, the second for the raising expenses. The vessel sank at her mooring January 23 or 24, 1970.

THE FACTS

Defendant issued to plaintiffs an American Institute Time (Hulls) Policy, insuring plaintiffs against loss by reason of specified perils and contingencies causing the total and/or

constructive total loss of various named vessels including the barge UBC NO. 5. The policy also contained provisions whereby defendants agreed to pay certain other charges, including raising, in addition to constructive and/or total loss (Sue and Labor charges). The policy attached August 2, 1969 for a period of one year. (Insurance Contract Ex./ A)*

In January 1970 the UBC NO. 5 was found to have sustained damage to her bottom as a result of towage through ice (Opinion A Hermann A). The vessel was drydocked and the damage repaired. While on drydock her bottom was examined and the damage found after the subsequent sinking was not then present Hermann A).

On January 21, 1970 at a railroad pier in South Amboy, New Jersey about 2100 tons of coal was loaded aboard the barge (Opinion A Hermann A). Loading was accomplished by inverting railroad hopper cars at the top of a chute causing the coal to slide down the chute into the various compartments of the barge which was moved backwards and forwards to maintain trim (Hermann A). Upon completion of loading the NO. 5 was moved to a nearby pier to await towage to destination (Opinion A).

On the morning of the day following the loading the barge was boarded by Hermann, an employee of plaintiff (A). He observed that she was carrying a normal load of about 2100 tons (A). She had a normal freeboard, was riding on an even keel,

* Numerals preceded by the letter A indicate pages in the joint appendix unless otherwise indicated.

trimmed so that the stern was slightly lower than the bow which is normal for towage (A). Hermann returned the following day, January 23rd, and found her in the same berth but water was covering the deck on the starboard (offshore) side for her entire length (A). Hermann immediately reported that the boat could not be towed and arranged for a floating derrick to be despatched to unload cargo so that such repairs as were necessary might be made. He also inquired of the railroad authorities where the barge would be safe in her then condition and was told to move her inshore where there was shallow water (A). Hermann arranged for a tug to accomplish that movement and put out additional lines to insure holding the barge in her berth. Returning about 8 a.m. on the morning of January 24, Hermann found the barge completely sunk. Her lines had parted and she had moved away from the dock (A). Arrangements were then made to commence the task of raising the vessel but within a day or so those operations were suspended because the derrick owner was unwilling to let his derrick lie at South Amboy in the face of an impending strike of tugboat personnel (Hermann A).

Underwriters having been notified of the incident, their surveyor William Kaminsky visited the barge at various times thereafter (A). Upon termination of the strike the work of raising the vessel was resumed. Underwriters surveyor made several visits to the barge during the course of raising (A). On one visit he observed that while the salvors had been able to raise the stern end the forward portion was still submerged (A).

Ultimately the vessel was raised and taken to a shipyard in Brooklyn where she was hauled out on drydock (Opinion A) (Laba A). Underwriters representative, Kaminsky, again visited the vessel and observed water running out of numerous holes in the barge's bottom (Kaminsky A). The following day he was informed by plaintiffs' representatives that while they would press their claim against defendant for the raising costs (Sue and Labor charges) they would not present claim for the damage to the hull (A). He requested permission to take photographs but was told the assured would prefer he did not (A). Later he was advised by telephone that plaintiffs had found a crack in the forepeak of the vessel but declined an invitation to examine it (Kaminsky A). The defendant itself was advised that no claim for hull damage would be advanced although the claim for out of pocket raising charges (Sue and Labor costs) would be pressed (Chassen A). The raising charges total $40,493.23. The reasonable cost of repairing the damage to the hull was $73,835.00 (A).

When plaintiffs presented the Sue and Labor claim the defendant denied liability. Thereafter this suit was instituted for the agreed value of the barge on a constructive total loss basis as well as for the Sue and Labor charges.

THE OPINION

At the trial plaintiffs contended that proof of the unintentional entry of sea water was sufficient to establish an

insured peril under defendant's modern form of policy. Citing cases pre-dating a landmark decision of this Court rendered in 1957 and another rendered by the 5th Circuit in the same year, the Court dismissed the claim on the ground that plaintiffs had failed to prove the cause of the sinking which it was their obligation to do (Opinion, A).

THE QUESTION PRESENTED

Under the form of insurance contract involved in this case was plaintiffs' proof of the sinking due to the unintentional entry of sea water sufficient to establish an insured peril placing upon defendant the obligation to go forward with proof that plaintiffs had knowingly permitted the vessel to "break ground in an unseaworthy condition"?

PLAINTIFFS CONTENTIONS

Plaintiffs will demonstrate:

1) The unintentional entry of sea water constitutes an insured peril under this form of contract.

2) The burden of coming forward with evidence that plaintiffs "knowingly permitted the vessel to break ground in an unseaworthy condition" rested upon defendant.

3) The insurance contract does not require the holding of a formal survey.

4) The omission to hold a formal survey does not affect plaintiffs' claim under the Sue and Labor clauses nor does it affect the hull damage claim.

5) No consideration for relinquishing plaintiffs' claim for hull damage having been given, plaintiffs were not barred from presenting it.

6) Plaintiffs were not obliged to tender abandonment of the UBC NO. 5.

POINT I

UNDER THE INVOLVED FORM OF POLICY THE ASSURED WAS NOT OBLIGED TO PROVE THE PRECISE CAUSE OF THE ENTRY OF WATER INTO THE VESSEL'S HULL

As the Fifth Circuit pointed out in The Sea Pack - Tropical Marine Products Inc. v. Birmingham Fire Insurance Co. 247 F 2d 116 - 122 (1957) many of the older marine insurance cases involved policies which contained an express warranty of continuing seaworthiness and an exclusion of losses caused by unseaworthiness. The Opinion here shows the District Court relied on those older cases.

The policy here involved, however, is an (American) Time Hull Policy containing the Inchmaree clause (Policy Ex./A). Speaking of a similar form of policy the Fifth Circuit said in Tropical Marine v. Birmingham Fire (supra) (at 123):

> " * * * a Time Hull Policy with no warranty of continuing seaworthiness but with an Inchmaree clause does in fact underwrite unseaworthiness of many types."

In the above quoted case the Fifth Circuit, reversing the District Court, granted the assured recovery even though, as the District Court had found (p. 118), "there is no explanation as to what caused the leak which resulted in the

loss of the vessel".

New York, New Haven & Hartford RR Co. v. Gray decided by this Circuit in 1957, 240 F 2d 460, cert. denied 353 U.S. 966 involved an English policy but, as stated in footnote 10 to that opinion, the American rule is the same. The Court described the circumstances of the loss thus (463):

> "The trial judge denied recovery because he held that the loss incurred was not caused by any 'peril of the seas.' As his findings show, the loss occurred as follows: The 'sea' (i.e., water from the river) leaked into the carfloat; this caused the vessel to list and settle; this, in turn, caused some of the railroad's cars and their cargo to slide into the river; then the vessel lurched and other cars and their cargo also fell into the river . . . "

The Court also said (464):

> "The loss resulted from a 'peril of the seas.' It is enough that damage be done by the fortuitous action of the sea. For instance, where cargo was damaged by the incursion of seawater through a hole in a pipe gnawed by rats, the House of Lords held this to be a peril of the seas.' That the sea is calm makes no difference."

In "The Panamanian" -- Compania Transatlantica Centroamericana, S.A. v Alliance Assur. Co., 50 F. Supp. 986 (SDNY) (1943) wherein the Court granted plaintiff a recovery under an

insurance policy the rule was stated (at 990):

> "Prima facie, the accidental incursion of sea water into a vessel, through an opening not intended for the purpose, is a peril of the sea. Canada Rice Mills, Ltd., vs. Union Marine and General Insurance Co., Ltd., 1941, A.C. 55, 68. It does not follow that the insurer is liable for loss attributable to every incursion of sea water. The underwriter may show that the loss was not caused by a peril of the sea but by the intentional scuttling of the vessel. P. Samuel & Co., Ltd. v. Dumas, 1924, A.C. 431, by the inherent unfitness of the vessel, Grant, Smith & Co. vs. Seattle Construction and Dry Dock Co., 1920, A.C. 162, by the exhaustion of the vessel's useful life through wear and tear, Wadsworth Lighterage and Coaling Co., Ltd., vs. Sea Insurance Co., Ltd., 1929, 35 Comm. Cas. 1, or by an explosion in the cargo, the G.R. Booth, 1898, 171 U.S. 450, 19 S.Ct. 9, 43 L. Ed. 234."

In Gulf Coast Trawlers v. Resolute Insurance Co., 239 F. Supp. 424 (1965) the suit was under an American Institute Time Hull Policy containing an Inchmaree clause, in all important respects similar to the form of the policy involved herein. The precise cause of the sinking could not be established. Awarding recovery to the assured, the Court said (427):

> " . . . and, therefore, since I cannot determine from the evidence what caused the leak which resulted in the sinking and loss of the JOYCE MARIE, the loss was within the coverage of the policy."

In Jack Neilson v. Chicago Insurance Co. 450 F 2d 156 (1971) the District Court had directed a verdict in favor of the insurers on the ground that plaintiff claimed but failed

to prove that the cause of the sinking was a recent grounding of the vessel. Reversing, the Court of Appeals said at (156):

> "It appears that the Court did not consider the question of whether Tropical Marine Products v. Birmingham Fire Ins. Co. 247 F 2d 116 (5th Cir. 1957) might apply, a possibility which is for consideration by the trial court in the first instance. See also Gulf Coast Trawlers Inc. v. Resolute Insurance Co. 239 F. Supp. 424 (SD Tex. 1965)."

The New York Appellate Division followed the same rule in McAllister v. Western Assurance Co. 218 App. Div. 564 N.Y.S. saying (570):

> "I reach the conclusion, based on the foregoing cases and the others discussed in the opinions therein, that it is not necessary that there should be the action of the sea, wind or waves, violent or otherwise, to cause a peril of the sea, but that a truly accidental occurrence, peculiar to the sea such as the entry of sea water through the seams of a vessel, which have opened, or through a hole in her hull (neither occurrence happening through design) constitutes a peril of the sea, within the meaning of a policy of marine insurance."

The above cited case and other New York cases were cited with approval by the Second Circuit in Allen N. Spooner & Son v. Connecticut Fire Ins. Co., 314 F. 2d 753 (1963).

In view of the above authorities and since plaintiffs proved the loss was due to incursion of sea water the District Court, we submit, fell into fundamental error when it said

p6 A—

(Opinion):

> "The plaintiff must bear the burden of proof that the cause of the sinking comes within the coverage of the insurance policy * * * and plaintiff has totally failed to meet this burden." (underscoring supplied).

The District Court summarized plaintiffs' contention as

p7 follows (Opinion A):

> "The plaintiff here admits that it cannot point to the precise 'proximate cause' of the sinking of the UBC NO. 5. It claims, however, that such a showing is unnecessary in light of its interpretation of the law in this Circuit as enunciated in New York, New Haven & Hartford RR v. Gray, 240 F 2d 460 (2nd Cir. 1957) and Allen N. Spooner & Son, Inc. v. Connecticut Fire Ins. Co., 314 F 2d 753 (2nd Cir. 1963). It is plaintiffs contention that these cases mean that any 'opening in a vessel's hull, not caused by the owner's design or neglect, which admits sea water is a marine peril within the meaning of the insurance policy' (Plaintiffs Post Trial Brief p. 10). I do not read the cases to hold such a far-reaching and all encompassing rule of law. Cf. Sipowicz v. Wimble, 370 F. Supp. 442 (SDNY 1974)."

Sipowicz v. Wimble 370 F. Supp. 442 (SDNY 1974) cited by the Trial Court in the above quotation is not contrary to any of the cases hereinabove cited in support of plaintiffs position. In it the Court specifically found that the incursion of water into the insured vessel resulted from a separation between the keel and the keelson and the remainder of the hull "which separation was the direct and proximate consequences of the deteriorated condition of the fastenings

and frames which secured the keel and the keelson to the rest of the hull". The fastenings had deteriorated from an original 3/8" thickness to 1/16" and were not capable of supporting the weight of the hull. Thus defendant had proven the incursion of water to be due to owner's neglect Cf. Compania Transatlantica v. Alliance Assurance Co. (supra).

Indeed the Sipowicz case is favorable to plaintiff here in that it recognizes that, since New York, New Haven & Hartford v. Gray (supra) this Circuit no longer requires an "extra-ordinary occurrence" to establish a sea peril (see page 446 of reported opinion). Thus the Sipowicz decision holds in effect that the definition of a sea peril quoted from the Giulia 218 Fed 744 (1914) by the Trial Court is no longer as narrow and restricted as the Giulia stated.

The District Court's opinion also cites R.T. Jones Lumber Company v. Roen S/S Co. 270 Fed 456. That case involved a carrier's effort to escape liability for cargo damage by asserting a peril of the sea.

As authority for its holding that plaintiff failed to meet its burden of proof the Trial Court cited Northwestern Mutual Life Ins. Co. v. Linard 498 F 2d 556 (1974). That case does not constitute authority for defendant's position. It involved a claim of scuttling or "castaway" which as the opinion shows falls into the same exceptional class as an arson case. The

Trial Court had found the insurers' evidence of scuttling in equipoise with the assured's proof that the sinking was due to an insured contingency. This Court affirmed the Trial Court's dismissal of the complaint. After discussing various cases involving burden of proof, the Court citing New York, New Haven and Hartford RR Co. v. Gray (supra) stated (p. 561):

> "While negligence, whether or not gross, is not a defense to a marine policy generally, id at 464 'willful misconduct' measuring up to 'knavery' or 'design' is as a matter of public policy. * * * There is no doubt but that under the English cases - to which great weight must be given in the field of marine insurance (citing cases) - the defense of willful misconduct by way of scuttling or 'casting away' is treated in a particular way." (Emphasis Supplied)

The Court further said (562):

> "The burden of proof, or rather risk of non-persuasion, is cast on the shipowners basically because they have more information more readily available (citing cases). This does not mean that the Underwriter may rest without meeting the prima facie case of the assured; he must go forward with evidence sufficient to convince the trier that the probability of scuttling is as great as the probability that the loss was fortuitous (citing cases) at which point the risk of non-persuasion rests as it always has upon the assured. It is on this basis that the Court below found for the Underwriter and with it we have no quarrel." (Emphasis Supplied)

We submit the above authorities firmly establish as existing law the well recognized rule that proof of the un-

intentional incursion of sea water is sufficient to show a loss by sea peril, casting upon Underwriters the burden of going forward with evidence to persuade the Court that the incursion was due to a breach of warranty, express or implied, or other cause for which public policy or good conscience would be upset if recovery were granted. Until - but not until - the insurer has presented such evidence, the assured is entitled to recovery on the basis of the occurrence of a peril of the sea.

In closing this point it is pertinent to note that the case cited by the District Court as authority for the statement that plaintiff has the burden of proof, Continental Ins. Co. v. Patton-Tully Transp. Co. 212 F 2d 543, involved a policy which contained express warranties of seaworthiness much more stringent than the implied warranty of this policy.

We submit the District Court erred in holding that plaintiffs had not proved the loss due to a peril of the sea insured by the terms of defendant's policy.

POINT II

DEFENDANT OFFERED NO EVIDENCE THAT PLAINTIFFS KNOWINGLY PERMITTED THE UBC NO. 5 TO BREAK GROUND IN AN UNSEAWORTHY CONDITION

Since the insurance contract here involved is in the form of the American Time Hull Policy similar to that involved in Tropical Marine (supra) a quotation from that case is appropriate (247 F 2d 116 at 119):

> "But as we (citing case) and the Second Circuit (citing case) by almost simultaneous decisions have recently pointed out, the owner's obligation under a Time Policy, as was this one, is extremely limited: the vessel is seaworthy at the attachment of the insurance, but henceforth it is a sort of negative warranty i.e., the owner or those in privity with him will not knowingly send the vessel to sea in a deficient condition." (Emphasis Supplied)

The Second Circuit decision cited in the above quotation is New York, New Haven & Hartford RR Co. v. Gray (supra). There the Court quoted from Section 39 (5) of the English Marine Insurance Act which provides that in a Time Policy there is no implied warranty that the ship will be seaworthy at any state of the adventure "but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness". The Court then stated (466):

> "Appellees contend that the emphasized words relieve them of liability here. We think not. We assume, arguendo (1) that the evidence showed the 'privity of the assured' and (2) that, in each of the numerous trips made by this busy carfloat, it was 'sent to sea' when it left its moorings. Even so, we reject appellees' contention. For, when the loading occurred and when the accident happened, the carfloat had not been 'sent to sea' but was still moored."

The Fifth Circuit case cited in Tropical Marine (supra) is Saskatchewan v. Spot Pack 242 F 2d 385. There referring to the American Rule regarding the implied warranty of seaworthiness in a Time Policy the Court said (388):

> "And, unlike the English Rule which limits the warranty to the commencement of the voyage, the American Rule takes it somewhat further to extend, in point of time, a sort of negative, modified warranty. It is not that the vessel shall continue absolutely to be kept in a seaworthy condition, or even that she be so at the inception of each voyage, or before departure from each port during the policy term. It is, rather, stated in the negative that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition. And, unlike a breach of a warranty of continuing seaworthiness, express or implied, which voids the policy altogether, the consequence of a violation of this 'negative' burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness."

Obviously the numerous decisions cited above recognized the proposition that owners and insurers are aware that an

opening in the hull may occur because of waste or deterioration in a plank or plate, somewhat sooner than might be expected. Both parties want to insure against substantial loss resulting therefrom which means the insurer is paid and the assured is willing to pay for insurance against the risk of a large loss from a small cause. That is why the rule has evolved that the insurer must overcome plaintiffs prima facie case by offering some evidence that the owner knowingly sent the vessel to sea in an unseaworthy condition.

The Trial Court did not find that any condition of unseaworthiness existed at the time of the sinking of the UBC NO. 5 much less that the assured was privy to any such condition. In Tropical Marine Products v. Birmingham Fire Insurance (supra) the Court said (119):

> "Here the most that was determined as to unseaworthiness of the M/V SEA PAK was the Court's negative finding that the owner had not sustained its burden of proving seaworthiness. This is far from the opposite holding that the vessel was unseaworthy. On that, the Court did not make such a finding and perhaps for the reason that, on the record before him, it was doubtful that there was sufficient proof".

In the case at bar the proof shows without contradiction that the bottom of the UBC NO. 5 had been sighted about two weeks prior to her sinking when certain damage caused by towage through ice had been repaired (Opinion A). The proof further

is that the condition of holes and set-up bottom plates found to exist after the sinking did not exist when the bottom was last sighted (Hermann).

There is competent evidence that the sinking and resting on the bottom for the extended period of the strike of tugboat personnel was the competent producing cause of all bottom damage found (Notine A). The defendant's surveyor admitted that if, prior to the sinking, the bottom of the UBC NO. 5 was in the condition found after the sinking she would have sunk during the course of loading (Kaminsky A). (See also Notine A). There is also proof that when the vessel was converted into a coal barge her bottom plates were tested for thickness and found adequate to justify the investment of the substantial conversion costs (Notine A).

Moreover, as in New York, New Haven & Hartford v. Gray (supra), the UBC NO. 5 had not been "sent to sea". When, after completion of loading the barge was found to be listing she was placed in a shallow water berth to await unloading, and moored with additional lines pending the arrival of the unloading derrick, but the lines parted allowing the vessel to move into deeper water and completely sink (Opinion A). As in the Gray case (supra), there was a "concatenation of fortuitious circumstances".

Accordingly, it is submitted, the defendant has failed to

offer any proof to persuade the Court that the entry of water into the UBC NO. 5 was due to design or neglect of the assured or to unseaworthiness existing within its privity or to knowingly sending her to sea in a deficient condition.

Defendant can, and no doubt will, as in the past, cite cases holding that existence of an unseaworthy condition at the time of loss is sufficient to deny an assured recovery. But with the possible exception of a recent district court decision any cases cited by defendant, especially in this Circuit, will be found to pre-date New York, New Haven & Hartford RR v. Gray (supra) (2nd Cir.), Tropical Marine v. Birmingham Fire (supra) and the other recent cases cited in Point I of this brief.

For generations the Courts of this country have consistently striven for uniformity in matters of marine insurance. Indeed the effort has been for consistency not only nationally but with decisions of another leading maritime nation, England. Gilmore & Black on Admiralty (1957) p. 51. On the question here presented the two most experienced maritime Courts in the United States - this and the Fifth - agreed within two months of each other, but independently, upon the law of the important legal issues involved herein under modern forms of marine insurance contracts. Cf. Tropical Marine v. Birmingham (supra).

The notation in the upper left corner of the policy indicates insurers revised it in January 1964, almost seven years after the decisions in New York, New Haven & Hartford RR Co. v. Gray

(supra) and Tropical Marine v. Birmingham (supra) and Saskatchewan v. Spot Pak 242 F 2d 385, the Fifth Circuit forerunner to Tropical Marine (supra). The involved clauses were not changed. Defendant either agreed with the Court's interpretation or led the public to believe it did. We respectfully, but earnestly, submit that this decision, citing older precedents, goes a long way toward destroying such long sought unanimity.

POINT III

PLAINTIFFS' CAUSE OF ACTION FOR RAISING EXPENSES WAS COMPLETE UPON DRYDOCKING THE VESSEL. EVENTS THEREAFTER COULD NOT AND DID NOT AFFECT IT.

The expenses incurred by plaintiffs in raising the UBC NO. 5 prior to the damage survey constitute the second cause of action of the complaint. That cause of action is founded upon the "Sue and Labor Clause" appearing at lines 101 to 106 of the Policy which reads:

> "And in case of any Loss or Misfortune it shall be lawful and necessary for the Assured, their Factors, Servants and Assigns to Sue, Labor and Travel for, in, and about the Defense, Safeguard and Recovery of the said vessel & or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below.

Lines 189 to 191 provide:

> In the event of expenditure under the Sue and Labor clause, this Policy shall pay the proportion of such expenses that the amount insured hereunder bears to the insured value of the vessel, or that the amount insured hereunder, less loss and/or damage payable under this Policy bears to the actual value of the salved property, whichever proportion shall be less."

See also lines 192 to 195.

It is well settled that the Sue and Labor Clause constitutes additional coverage payable in addition to a full

payment of the agreed insured value if the vessel be a total or constructive total loss. Seaboard Shipping Corp. v. Jocharanne Tugboat Corp. (CA 2) 461 F 2d 500 (1972) at 503.

Thus when defendants were notified of the sinking and proposed raising of the vessel they knew they faced two separate claims, one for Sue and Labor expenses and another for either repair costs or constructive total loss. Their surveyor visited the vessel during the course of raising (Kaminsky A). TR 81

The contract of insurance drawn by the defendant and for which plaintiffs paid it a substantial consideration carefully and precisely sets forth the assured's obligations after an accident. Ex. A lines 122 to 129:

> "In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire. The Underwriters shall be entitled to decide the port to which a damaged Vessel shall proceed for docking or repairing (the actual additional expense of the voyage arising from compliance with Underwriters' requirements being refunded to the Assured) and Underwriters shall also have a right of veto in connection with the place of repair or repairing firm proposed and whenever the extent of the damage is ascertainable the majority (in amount) of the Underwriters may take or may require to be taken tenders for the repair of such damage. In the event of failure to comply with the conditions of this clause 15 per cent shall be deducted from the amount of the ascertained claim."

Here, since the insurer had notice of accident and appointed its own surveyor, there was full compliance with the terms and conditions of the contract. Unlike the policy provision in Rock Transport v. Hartford Fire Insurance Co. 2 Cir. 433 F 2d 152 (1970), this policy did not require notice of loss so that the insurer could have its own surveyor attend any survey. Here the insurer merely required notice of accident. Obviously defendant wanted opportunity to investigate the cause of damage (Cf. Chassen A). However, there is no requirement that the assured assist the insurer in an investigation to try to find a ground for avoiding the obligations of the contract.

Ex 2 p 6

Indeed the parties by their contract agreed upon the consequences of a failure to give notice of accident - a deduction of "15% from the amount of the ascertained claim" Policy Ex. 1 lines 128-9.

1. A

Nowhere does the contract of insurance provide that a claim for Sue and Labor expense is conditioned upon a subsequent survey of the vessel.

Defendants surveyor admitted he was told, while the vessel was on drydock that the Sue and Labor claim would be presented (Kaminsky 87).

TR 87 A—

Accordingly, it is submitted, the District Court erred in dismissing the cause of action for Sue and Labor charges.

POINT IV

PLAINTIFFS WERE NOT OBLIGED TO HOLD A SURVEY

The provisions of the contract concerning notice of accident and repair of damage are quoted in Point III.

Despite those provisions and obviously under the mistaken view that plaintiffs were obliged to prove the precise cause of the entry of seawater, the Court dwelt upon its inability to find such cause and seemingly penalized plaintiffs because defendant did not investigate the matter.

As pointed out in Point III defendant knew at all times the Sue and Labor claim would be presented. Its surveyor, Kaminsky, saw the holes in the vessel's bottom and admitted the vessel would have sunk during loading if they existed at that time (A). He admitted he was told of the crack in the forepeak at least the day after his second visit to the drydock (Kaminsky 88, 98). He declined to examine that crack although invited to do so (Kaminsky 88). He made a memorandum concerning it (Ex. 16). Thus there was nothing about plaintiffs' conduct which hindered the Court in making a finding about the existence of the crack in the forepeak. Laba saw and described it (A). His testimony is not disputed. Kaminsky by his own admission was told of the crack in ample time to examine it. Plaintiffs surveyor D'Avella had died before trial (A) -

but it was he who, by Kaminsky's testimony told the latter about it (A TR 88). It seems reasonable to say that if the crack did not exist Kaminsky would not have been invited to see it.

But even if there had been no notice of accident and no examination of the vessel of any kind the parties had agreed by contract upon the consequences thereof - a deduction of 15%.

The Court stated that plaintiffs actions "effectively thwart me from making a finding" as to the cause of the fore-peak crack. While plaintiffs offered opinion evidence that it resulted from being struck by another vessel after loading, they have always taken the position that a finding as to the cause of the crack is not necessary to this case. The crack was a source of entry of seawater and since the barge would have sunk during loading if her bottom were holed as defendant claims it was the only apparent source.

POINT V

PLAINTIFF DID NOT WAIVE ITS CLAIM TO RECOVER FOR A CONSTRUCTIVE TOTAL LOSS

Plaintiffs do not dispute that in the early stages they said no claim for hull damage would be presented. But as the record shows, they at all times preserved their claim under the Sue and Labor Clause for raising expenses.

Plaintiffs and their affiliates own numerous vessels. Since marine insurance premiums for a given fleet are based upon the loss experience of the fleet owner, each loss paid under that owner's policy during a given policy period is recouped by underwriters who increase their premium to such owner over the next few years. Thus a fleet owner of substance faces a question of economics when a substantial loss occurs. That is particularly so in connection with a claim for a constructive total loss, as this was. Regardless of market value, taxes are imposed on the difference between book value and the insurer's payment. Thus collection from insurers involves the matter of taxes on any such difference as well as the certain knowledge that the amount paid by insurers will be paid out in increased premium within the next few years. As the record shows (A TR 40) those factors led plaintiffs to conclude that as a matter of economics they would be almost as well off if no claim for <u>hull damage</u> were presented.

But then defendant breached the insurance contract by refusing to pay the claim for Sue and Labor charges, thus forcing plaintiffs to resort to expensive protracted litigation.

There could have been no waiver of a claim under the insurance contract since there was no consideration therefore. Indeed in its letter to the insured's broker dated June 18, 1970 defendant's manager recognized that the withholding of claim for hull damage was "the assured's present intention" Ex. 18.

Defendant had no contractual right to a survey of the damage since it had agreed that claims presented in breach of the notice clause would be subject only to a deduction of 15% (Policy Ex. A lines). 1A 128-9

As the testimony of Kaminsky shows, defendant did examine the bottom damage (A) and through him declined opportunity to examine the crack in the forepeak even though the Sue & Labor claim was pending (A). (Kaminsky who specialized in representing underwriters (A) no doubt knew the cause of an opening in a vessel's hull was unimportant since it was a source of entry of water). Despite efforts to show his examination of the bottom holes was "cursory", as the Court held, he maintained it was adequate (A). TR 83 TR100 TR 78 TR97

The nub of the District Court's decision seems to be (Opinion A): P8

"Had the plaintiff at the time of the sinking treated the loss as a constructive total loss and made the requisite tender of abandonment * * * then a proper survey could have been made."

But the insurance contract provides (Ex. / lines 112-3).

"No recovery for a Constructive Total loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the Insured Value."

The insured value was $100,000.00 (Ex./).

When the vessel was found sunk neither plaintiffs nor defendant knew the extent or cost of repair of the damage or even the source of entry of water. If plaintiffs had made a tender of abandonment at that time they could not possibly have proven - as the insurance contract requires, that the cost of raising and repairing exceeded the insured value. Under the Sue and Labor clause plaintiffs had the right, if not the obligation, to raise the vessel Seaborad Shipping Corp. v. Jocharanne Tugboat Corporation (CA 2) 461 F 2d 500 (1972).

Plaintiffs had no reason to anticipate that a strike of tugboat personnel would delay the raising for about four months (Opinion A). If, without justification, plaintiffs had dashed headlong into a premature tender of abandonment and if defendants had engaged a diver to make an underwater inspection he would not have been able to determine the condition of the

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bottom. No doubt he would have observed the crack in the forepeak but the same strike which prevented plaintiffs from raising the barge would have prevented the defendants from doing so and the bottom damage would have occurred. Accordingly, tender of abandonment immediately after sinking, as the Court suggested, would have been a futile gesture. Oddly enough in an earlier part of the opinion the Court characterized defendant's argument that abandonment should have taken place then "strains credulity in the situation presented" (A). opinion p 6

In Rock Transport 312 F. Supp. 341 (1970) the Court said (347):

> "Abandonment is not, however, an absolute prerequisite to a claim for constructive total loss. It is not required if it would be a futile act or an idle ceremony, such as when the damaged property has already been sold or captured. Where an insurer disclaims liability on an insurance contract, it repudiates its interest in the contract and in the insured property. Disclaimer is totally incompatible with acceptance of a tender of abandonment. By disclaiming liability, an insurer, in effect, refuses abandonment because to accept it would require affirming liability and paying the full value of the contract. Disclaimer, thus, renders tender of abandonment totally futile."

and further (at 348):

> "Moreover, the special verdict granting defendant a credit of $247,500 for the salvage value of the scows is compatible with the ultimate purpose of abandonment to prevent a defendant from recovering the full value of the damaged property

and nevertheless retaining the property which, although damaged, is still of some value."

In an affirming decision in the above quoted case 433 F 2d 152 (supra) this Court did not discuss the matter of abandonment but concluded its opinion by saying (154):

"We have nothing to add to the discussion of the other points in the District Court's opinion and the judgment is affirmed."

Defendant conceded the plaintiffs figures for cost of repairs ($) and the sum realized from the sale ($6,000.00) as "fair ones" (A). At the conclusion of the trial the parties stipulated the claim for the raising costs were $40,493.23.

The policy provides (Ex. 1 A lines 165-6):

"No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value."

Thus plaintiffs are entitled to recover for a constructive total loss $100,000.00 less the proceeds of sale $6,000.00 or $94,000.00.

As previously demonstrated Sue and Labor charges are recoverable in addition to a total loss. Those are agreed at $40,493.23.

Respectfully submitted,

McHUGH, HECKMAN, SMITH & LEONARD
Attorneys for Appellants

CHRISTOPHER E. HECKMAN

MARTIN J. McHUGH

Of Counsel